In the Supreme Court of the United States

No. 75-1004

GUADALUPE JIMENEZ, et al.,
Appellants,

vs.

HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION OF APPELLEE HIDALGO AND CAMERON COUNTIES WATER CONTROL AND IMPROVEMENT DISTRICT NO. 9 (MERCEDES DISTRICT) TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT OF THE THREE JUDGE COURT

GARLAND F. SMITH
SMITH, MCILHERAN, YARBROUGH & GRIFFIN
P. O. Box 416
Weslaco, Texas 78596
(512) 968-2196
Attorneys for Said Appellees, Hidalgo and Cameron Counties Water Control and Improvement District No. 9, Its Officers and Directors

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Explanation of Reference Abbreviations:

1. Stipulations between Hidalgo and Cameron Counties Water Control and Improvement District No. 9 and Plaintiffs will be identified by the prefix MS followed by the stipulation number, (Example MS 1 stipulation numbered 1) and exhibits attached thereto will be identified by prefix MX followed by the exhibit number. Supplemental Stipulation is marked Sup. M plus number.
2. Appellants' Jurisdictional Statement will be referred to by the prefix J.S. followed by the page number.

Index of Authorities

In the Supreme Court of the United States

No. 75-1004

GUADALUPE JIMENEZ, et al.,
Appellants,

vs.

HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION OF APPELLEE HIDALGO AND CAMERON COUNTIES WATER CONTROL AND IMPROVEMENT DISTRICT NO. 9 (MERCEDES DISTRICT) TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT OF THE THREE JUDGE COURT

Pursuant to Rule 16, Paragraphs 1(a) and 1(c), Revised Rules of this Court, HIDALGO AND CAMERON COUNTIES WATER CONTROL AND IMPROVEMENT DISTRICT NO. 9, its officers and directors, Appellees here, move the Court to dismiss this appeal, or in the alternative, to affirm the judgment of the Three Judge District Court from which this appeal is taken.

QUESTIONS PRESENTED

The Appellants' Jurisdictional Statement on page 8 states the questions as follows:

1. Whether the plaintiffs and the class they represent were denied due process of law in the exclusion of their property from the defendant districts without reasonable and adequate notice of their right to be heard on an issue of substantial and direct interest?

2. Whether the exclusion of plaintiffs' communities from the districts for impermissible political motives denied plaintiffs the equal protection of the law?

3. Whether by singling out railroads as a favored class of landowner entitled to actual notice of a proposed exclusion of realty, Article 8280-3.2, V.A.T.C.S., denied to all other landowners, such as plaintiffs and their class, the equal protection of law?

STATUTE INVOLVED

Texas' Article 8280-3.2 is substantially quoted in Appellants' Judicial Statement, in the opinions of the Three Judge Court, the Fifth Circuit, and the Single Judge District Court. (J.S. p. 3-7, 1a-59a) An omitted Section 7 is supplied by the brief of Appellee, Hidalgo County Water Improvement District No. 2. (p. 2)

The statute is but a projection of a long standing state policy that treats urban and agricultural land differently.

Special purpose districts such as the two Appellee Districts (Hidalgo County Water Improvement District No. 2, hereinafter for brevity called the San Juan District; and Hidalgo and Cameron Counties Water Control and Improvement District No. 9, hereinafter called the Mercedes District) at their organization may include within their boundaries a "town, village, or municipal corporation" (Tex. Water Code, Sec. 51.012) but only if approved by a "majority of the electors in the city, town or municipal corporation" with a "separate voting district" provided for the urban and rural areas. (Tex. Water Code Sec. 51.035) These provisions were enacted in 1925, and were in effect when the Mercedes District was organized. These provisions recognize a potential conflict of interest between urban and agricultural lands. That land and land ownership and supply of irrigation water thereto are the dominant public policy considerations is evident from the constitutional provisions involved (Tex. Const. Art. III, Sec. 52 and Art. XVI, Sec. 59) and the Water Code provision that the petition for creation must be signed by "a majority of the persons who hold title to land in the proposed district which represents a total value of more than 50% of the value of all the land in the proposed district". (Sec. 51.013)

A non-resident owner of land within a district may serve as a director of the district, if elected by qualified electors residing in the district. (Tex. Water Code, Sec. 51.072) The clear intent of declared legislative policy is that these special purpose districts include within their boundaries only the lands that will be directly benefitted by their special services, *here irrigation*, and for the exclusion of lands not directly benefitted.

STATEMENT OF THE CASE

The two Appellee irrigation districts are controlled by the same laws. Their actions in excluding urban subdivisions complied in good faith with Art. 8280-3.2. Decision must turn on whether (1) notice by posting and publication per se denied Appellants notice of their right to be heard; (2) whether impermissible political motives denied Appellants equal protection; or (3) the requirement that railroads be given notice by mail created a favored class.

Repetition will not be here made of the statements of the case as made by Appellants, our co-Appellee, nor of the opinions of the three courts who have passed on the case. (Appellants' J.S. p. 8-12; San Juan District brief, p. 3-4; Three Judge Court, J.S. p. 2a-9a; Fifth Circuit, J.S. p. 24a-33a; Single Judge Court, J.S. p. 37a-39a) It may be helpful to the Court if we extract from the stipulated facts and present in chronological order the exact application by the Board of Directors of the Mercedes District of the public policy of the State as it relates to the distinction or inherent conflict of interest between "urban" and "agricultural" lands.

1. Urban Lands Excluded From Original Boundaries:

The Mercedes District was organized in 1928 and on January 1, 1930, purchased the irrigation system of the American Rio Grande Land and Irrigation Company, which served a gross of 84,833.75 acres within its outer boundaries, which included 5 cities. The original boundaries excluded 2,903.81 acres which composed the cities of Mercedes, Weslaco, Elsa, Edcouch, and LaVilla to whose

treatment plants it continued to furnish raw river water. (MS 9, 7 and MX 1 and 7)

2. Exclusion of Farm Lands Which Became "Urban" As Cities Grew:

The five cities grew out of their original boundaries into the agricultural lands of the District. The District was confronted with the problem of urban lands within its corporate boundaries. Such lands were not being irrigated, and were not benefitting directly from its irrigation purpose. The Texas Legislature recognized the problem in 1949 by the enactment of Article 8280-4. Between 1951 and 1972 the district in 15 separate exclusion orders one to two years apart, excluded a total of 2175.24 acres which had been annexed by the 5 cities within its outer boundaries, under Article 8280-4. (MS 3, 4, 5, 6, 7 and 8c, MX 1, 2 and 6)

3. Exclusion of Farm Lands Which Became "Urban" As a Result of Rural Subdivisions:

The 5 cities in the Mercedes District followed the National pattern in dealing with slums and the threat of slums posed by the mass movement to cities following World War II. They strengthened their subdivision ordinances to require urban developers to pave streets and lay water and sewer lines to serve the subdivision, as a condition of approval. Lack of appropriate land use laws providing similar protection outside city limits left a hiatus in regulation, which invited instant slum developers into the country, and they came. (MS 8h, 19, MX 4, p. 15-17, MX 13) Substantial irrigated farm land was converted to urban use within irrigation districts over the State and no longer used or contemplated use of the irrigation services of the districts. The Legislature again

took cognizance of the problem by passing Article 8280-3.2 here in question.

The Board of Directors of the Mercedes District complied in good faith with the procedures of Article 8280-3.2 and excluded 39 such urban subdivisions by its order of October 17, 1972. (MS 8, 8a, MX 1, MX 4) Notice given was by publication and posting, as provided by the Statute. Personal notice by certified mail was not given. Whatever the efficacy of the two methods of notice, *plaintiffs did in fact receive notice, and were present with their attorney at the public hearing held by the Mercedes District.* (MS 8) Those appearing admitted their land was not being farmed or irrigated but opposed exclusion because they wanted the District to provide them with domestic water and sewer services at a cost they could afford to pay. (MS 8d) Of the 39 urban tracts excluded, only 4 are represented by plaintiffs; all but two are adjacent to existing sources of potable water from a city or rural water supply corporation, or short extensions of such lines will make potable water available; the remaining two will be within range of lines of the Military Highway Rural Water Supply Corporation now under construction. (Sup. M Nos. 2, 3, 4, 5 and 6)

4. Other Concerns Confronting Board:

The plight of plaintiffs with respect to potable water supply did not escape the attention of the Board, and their right to domestic water was preserved in the same way and on the same terms as applied to the 5 cities within the outer boundaries of the district. (MS 8d, e, f, 9, MX 4) Other problems pressed for consideration:

a. *Possible Loss of Water Right for Irrigation of 812.11 acres*: The district held valid title to a water right to irrigate the 812.11 acres of the 39 excluded tracts, which

water right could be forfeited for non-use under Sec. 5.030 of the Texas Water Code. This could be prevented by excluding the urban lands, and transferring the irrigation right to 812.11 acres which would use it. (MS 12, 13)

b. *Districts' Domestic Water Is Limited*: A general water shortage resulted in an adjudication of the water rights of the Mercedes District, along with all diverters from the Rio Grande from Falcon Reservoir to the Gulf. *The State of Texas* v. *Hidalgo County WC & ID #18, et al.*, 443 SW2d 728. Water for domestic use within the rural areas of the district including the 39 tracts is limited to 4,230 acre feet annually. (MS 10 and 11) The district also holds as trustee title to water for the 5 cities and supplies raw water to their treatment plants. Encouragement of urban growth in rural areas could create a shortage in the districts' domestic supply. (MS 10a)

c. *Directors Were Appellants' Elected Representatives*: The five directors who passed the order of exclusion were elected by qualified voters of the 39 excluded tracts, as well as the remainder of the district. Appellants either participated or were entitled to participate in the elections at which the board members were elected. As such the directors had a responsibility as well to the residents of the 35 tracts who did not after invitation join plaintiffs' suit, and to the residents of the 4 tracts represented by plaintiffs, who wanted their lands excluded. (MS 32, 33)

d. *Potable Water Available at Cost*: Directors had, in addition to their contracts to supply raw water to the treatment plants of the five cities, made contracts with rural water supply corporations to furnish the domestic water allotment of its rural inhabitants to such corporations for treatment and return as potable water to the rural residents of the district through the lines of such

corporations. The directors thus knew that potable water was thus available at cost to all but 2 of said tracts with but slight extension of the supply lines of such cities and rural supply corporations; and the 2 tracts would soon have potable water available through the lines of the Military Highway Rural Water Supply Corporation. It was obvious that the District could accommodate plaintiffs' desires only if it could produce and deliver potable water to the 39 scattered urban tracts at a cost less than the cities and supply companies already in the water treatment business. (MS 24, Sup. M 1, 2, 3, 4, 5)

e. *Financing*: The Mercedes District had just completed a $10,800,000.00 reclamation project, and was indebted to the United States in that sum. There is a serious question as to whether the bonding capacity of the district would be adequate to duplicate the existing water lines and treatment facilities currently available to plaintiffs, even if it elected to do so. (MS 16, MX 8)

ARGUMENT AND AUTHORITIES

Appellants' Brief will be answered under the headings used in their Jurisdictional Statement:

A. Appellants Were Not Denied Due Process in Exclusion of Their Property Without Reasonable and Adequate Notice of Their Right to Be Heard on an Issue of Substantial and Direct Interest.

The Appellants either voted at the election at which the directors who excluded their land were elected, or were so qualified and entitled to so vote. There is no evidence that an Appellant, or any qualified person was, at such elections or any prior election, denied the franchise. Re-

gardless of how the notice was given, the Appellants had actual notice of the public hearing, appeared, and presented evidence. The evidence presented by Appellants at the hearing supported the findings made by the Board in excluding their urban lands. (MS 8, MX 4) The stipulations and evidence presented in the trial below reveal the existence of no evidence that would justify a finding other than that made by the Board.

Although the facts are agreed, Appellants would change the result by equating this to be a voting rights case, controlled by *Gomillion* v. *Lightfoot*, 364 U.S. 339, rather than a boundary case controlled by *Hunter* v. *City of Pittsburgh*, 207 U.S. 161. (J.S. p. 15 to 18) The Three Judge Court correctly observed that it was "boundaries" here involved, and for a permissible constitutional reason, and declined to substitute the word "urban" for "colored" and thereby strike down the legislative power of the states to deal differently between "urban" and "farm" land. (J.S. p. 6a-13a)

Appellants then seek to equate the exclusions to a judicial process, requiring personal notice as in *Mullane* v. *Central Hanover Bank and Trust Company*, 339 U.S. 306 and *Schroeder* v. *City of New York*, 371 U.S. 208, where property interests and the judicial process were involved, rather than a legislative process to change boundaries of a political subdivision where constructive notice is adequate, as in *Pittsburgh* v. *Hunter*. The Three Judge Court correctly rejected this contention, citing numerous statutes providing for notice by posting and publication in boundary situations, and pointing out the inconvenience approaching impossibility of giving personal notice in two languages to the entire population and non-resident land owners of such political subdivisions in the boundary situation here involved. (J.S. p. 14a-18a) The Court cor-

rectly observed that appellants' reliance on *Mullane* and *Schroeder* (J.S. p. 18a) is misplaced:

> Each of those cases involved an existing, tangible property interest, as opposed to what here seems to be at best an intangible, possible future interest of undetermined nature.

The Court then concluded that the notice provisions of Article 8280-3.2 are constitutional.

B. The Exclusion of Appellants' Communities Was Not for Impermissible Political Motives, and Did Not Deny Appellants Equal Protection of the Law.

Appellants do not ask for a service available to others, but denied to Appellants since these Districts have never provided such services to anyone. They would have the districts duplicate existing water purification plants of the cities and rural supply corporations and lay competing water lines into the 39 urban subdivisions scattered over the 84,659 rural acres of the Mercedes District and the 65,000 acres of the San Juan District. No racial or ethnic issues are here involved and there is no evidence to support such a contention. Rural residents of all racial and ethnic backgrounds have always made their own provisions for drinking and domestic water, which is true nationwide.

Appellants claim they were "fenced out" of the Districts involved for impermissible political reasons. There is no claim of racial discrimination, as was present in *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). It has been stipulated that racial discrimination was not the basis for the Districts' actions. In fact, there is no evidence of any motive or design on the part

of Appellee districts other than the exclusion of "urban lands" from the corporate boundaries of the districts to avoid a forfeiture of irrigation rights to the acres excluded, where irrigation had been discontinued, and the transfer of such rights to other lands seeking irrigation services. Appellants still receive untreated water from the districts for domestic use. The argument that the areas in question were excluded because of a fear of how they would vote in the future is mere speculation, and constitutional adjudications cannot be made upon that basis.

This appellee denies any stipulation or judicial admission that appellants' lands were excluded because of such speculation. To reduce appellants' proposal to its ultimate absurdity, the Mercedes District did arguendo presume their success to demonstrate the insubstantial nature of appellants' claim. All such speculations were used as an argument indicating the economic and political folly of seeking to acquire domestic water and sewer services at a price below that available through existing sources from a water district which has, from its inception, engaged primarily in irrigation functions, which has no present facilities to engage in such activities, and which, quite probably, does not have the financial capability to construct such facilities even if the directors wished to do so. While such practical realities must be considered by Courts as well as other decision making bodies, there is no evidence that the directors considered anything other than whether the owner of the land did or did not utilize the irrigation services provided by the districts, whether the land was urban in fact, and whether exclusion would be in the best interest of both the urban lands and the district.

An important distinction between the "voting rights" cases and this case is that the former deal with a statute or constitutional provision which operated to selectively

distribute the franchise to one class of residents while denying it to others for political or economic reasons. *Carrington* v. *Rash,* 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); *Evans* v. *Cornman,* 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970); *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Phoenix* v. *Kolodziejski,* 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970). In such cases, the challenged statute must be examined to determine whether the exclusions are necessary to promote a compelling state interest. *Dunn* v. *Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).

However the challenged statute in the case does not seek to distribute the franchise but merely provides a statutory means to exclude "urban" property from an agricultural water district. Since the challenged statute does not operate to distribute the franchise to selected classes of potential voters and since there is no evidence of any improper motive, either on the part of the Texas Legislature in passing the statute or on the part of the districts in excluding the "urban" tracts, Appellants have not been unconstitutionally "fenced out" of the WCIDs involved and have not been denied equal protection of the laws.

C. District Court Decision Is Not in Conflict With Applicable Precedents Regarding Notice by Mail to Railroads.

The statute does provide that "notice shall be given to the railroad company by mailing, first class" etc. (J.S. p. 23, 15a) The valid and constitutional basis for this requirement is stated in the opinion of the Single Judge Court (J.S. p. 52a-53a) and the Three Judge Court (J.S.

p. 18a-20a) and further argued in the Brief of the San Juan District, pages 12-14. For brevity, these arguments and authorities are adopted.

CONCLUSION

The Mercedes District has here demonstrated that the act of the District in excluding Appellants' urban lands was a legislative act, wherein notice by posting and publication is adequate; that Appellants' right to keep their urban lands within the irrigation district is not a constitutionally protected right, and no invidious motive prompted the Districts' action; and that provision for personal (by mail) notice to railroads is justified by permissible state interest, and does not deny to Appellants equal protection of the law.

WHEREFORE, this Appellee urges that this appeal should be dismissed, or in the alternative, the judgment of the Three Judge District Court should be affirmed.

Respectfully submitted,

By: GARLAND F. SMITH
SMITH, MCILHERAN, YARBROUGH & GRIFFIN
P. O. Box 416
Weslaco, Texas 78596
(512) 968-2196

Attorneys for Hidalgo and Cameron Counties Water Control and Improvement District No. 9, Its Officers and Directors, Appellees Herein

PROOF OF SERVICE

I, Garland F. Smith, one of the attorneys for Hidalgo and Cameron Counties Water Control and Improvement District No. 9, its Officers and Directors, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of February, 1976, I served copies of the foregoing Appeal, on the several parties thereto as follows:

1. On Guadalupe Jimenez, et al., Appellants, by mailing three copies to each in a duly addressed envelope, with postage prepaid, to the following:

   Mr. David G. Hall
   Texas Rural Legal Aid, Inc.
   103 East Third Street
   Weslaco, Texas 78596

   Messrs. Melvin L. Wulf and
   Joel M. Gora
   American Civil Liberties Union Foundation, Inc.
   22 East 40th Street
   New York, New York 10016

   Mr. Sanford Jay Rosen
   3504 Clay
   San Francisco, California 94118

2. On Hidalgo County Water Improvement District No. 2, by mailing three copies in a duly addressed envelope, with postage prepaid, to Mr. Morris Atlas, P. O. Drawer 3725, McAllen, Texas 78501.

It is further certified that all parties required to be served have been served.

By: GARLAND F. SMITH
SMITH, MCILHERAN, YARBROUGH & GRIFFIN
Weslaco, Texas 78596
(512) 968-2196